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No. 88-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PANHANDLE EASTERN PIPE LINE COMPANY,

Petitioner,

v.

STATE OF ILLINOIS, ex rel. NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S OBJECTIONS TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rules 36 and 42 of the Rules of the Court, respondent State of Illinois ("State") respectfully files these objections to the motions filed by the Kansas Power and Light Company ("KPL") and the Interstate Natural Gas Association of America ("INGAA") for leave to file briefs as *amicus curiae*.

Respondent withheld consent and specifically objects to the motions filed by KPL and INGAA for a number of reasons, not the least of which is that neither KPL nor INGAA provided respondent with a copy of its brief as *amicus curiae* or informed respondent of the proposed nature and content of its brief prior to seeking respondent's consent. In fact, respondent did not receive KPL's and INGAA's motions and briefs until four and five days, respectively, after respondent filed its brief in opposition to the petition for writ of certiorari. Now having reviewed said motions, respondent objects to their filing on the ground that the motions fail to demonstrate that either KPL or INGAA have a legitimate interest in the outcome of the question before the Court on petition for writ of certiorari. Further, no new probative argument has been advanced by either of the proposed *amici* on the question presented by the petition.

1. INGAA's primary message to the Court is that the members of its association join the petitioner in advocating that, if there must be antitrust enforcement against pipelines, the designated plaintiff of their choice is the local distribution company ("LDC") (INGAA at 3-6).[1] The request of the pipelines is understandable for not only is CILCO captive to the petitioner, it is beholden to the petitioner as evidenced by the uncontested fact that in 1983 and 1984, when the petitioner's anticompetitive overcharge was at its highest, CILCO's corporate profits were at a record level. No wonder INGAA promotes the LDC as being the "appropriate party in the dispute for purposes of achieving settlement." (INGAA at 8). The Court in *Illi-*

[1] "INGAA" refers to the Motion for Leave to File Brief as *Amicus Curiae* and Brief of Interstate Natural Gas Association of America.

nois Brick Co. v. Illinois, 431 U.S. 720 (1977), however, was in no way concerned with the antitrust violator's choice of adversary.

2. Next, INGAA claims that if certiorari is denied it will have difficulty in formulating an overall policy of deciding in which states its members may, with impunity, exact supracompetitive prices from their captive residential consumers (INGAA at 8). *Illinois Brick* should have already informed the members that regardless of which state is involved, if the captive residential consumers have a cost-plus contract with the LDC those consumers may exercise their *right* to sue under §4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 736-737; 15 U.S.C. §15.

3. Lastly, INGAA, on behalf of the interstate pipelines, feigns concern for the efficient allocation of damages (INGAA at 6-8). This issue, however, is premature in light of the interlocutory nature of the petitioner's appeal and the fact that the district court has not ruled on the issue of liability after the trial on the merits. Nevertheless, allocation of damages will not be a problem. The Seventh Circuit has indicated that proof of the residential consumers' damages will be straightforward: "[The residential] customers are not seeking damages for gas they did not buy, and the damages for the gas they did buy can simply be read off from their gas bills" (R. App. at 10).[2] INGAA's entire argument is premised on the faulty assumption that unless the direct purchaser is the plaintiff, it will not cooperate in the distribution of damages. Here, the officers and employees of CILCO were the principal witnesses for the State on the issue of liability and fully cooperated with the State and the district

[2] "R. App." refers to the Respondent's Appendix.

court throughout the entire three and one-half years of litigation. That cooperation will continue with CILCO making available to the State whatever records are necessary to determine the appropriate allocation of damages to CILCO's residential customers.

4. The arguments raised by KPL in its motion and brief simply mirror the contentions raised by petitioner. KPL argues that even if there is no absorption of the overcharge by the direct purchaser and, therefore, no apportionment, *Illinois Brick* would still mandate that KPL be allowed to continue its action for that overcharge (KPL at 6-9).[3] KPL's real quarrel is with the decision of the Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), not with the decision of the Seventh Circuit in this case. It is *Hanover Shoe* that dictates that where there is a cost-plus contract between the direct and indirect purchaser, as the Seventh Circuit found here, the defendant can assert the pass-on defense against the direct purchaser. Despite the fact that KPL would face the *Hanover Shoe* defense and that its captive residential customers, who were the actual victims of the overcharge, stand ready to prosecute the violation, KPL amazingly insists that it—and not its customers—should sue for the overcharge.

Consistent with this apparent conflict with its residential customers, KPL joins with the petitioners in mischaracterizing the Seventh Circuit's holding as being the creation of a "functional equivalent" or "regulatory equivalent" exception. The fact that the Seventh Circuit expressly found in this case that the CILCO-residential consumer

[3] "KPL" refers to the Motion for Leave to File Brief *Amicus Curiae* and Brief filed by the Kansas Power and Light Company.

relationship was a cost-plus contract, and *not* a functional equivalent of one, has been addressed by respondent in its brief in opposition (Resp. at 6-8, 11-12).[4]

For these reasons, respondent respectfully requests that the motions of KPL and INGAA for leave to file briefs as *amicus curiae* be denied.

Respectfully submitted,

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Dated: November 22, 1988

[4] "Resp." refers to the Brief in Opposition to the Petition for Writ of Certiorari filed by respondent State of Illinois.